SUPREME COURT, U. S.

FILED

MAR 18 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1002

HEINRICH C. HORN,

Petitioner,

versus

CIA DE NAVEGACION FRUCO, S. A., and J. R. ATKINS, d/b/a ALABAMA FRUIT AND PRODUCE COMPANY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

T. K. JACKSON, JR.
1101 Merchants National Bank Building
Mobile, Alabama 36601
Counsel for Respondent

RAE M. CROWE
W. BOYD REEVES
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank
Mobile, Alabama
Of Counsel

INDEX

Page

Opinions Below 2
Jurisdiction 2
Questions Presented 2
Statutes Involved 2
Statement 2
Reasons for Refusing the Writ 8
Conclusion 17
Proof of Service 18

CITATIONS

Page

Cases:

Cullen Fuel Co. vs.Hedger Co.,
1933, 290 U.S. 82 15

Elia Salzman Tobacco Co. vs. S.S. Mormacwind,
371 F. 2d 537 14

Framlington Court, The, 69 F. 2d 300 9,10,15

International Navigation Co. vs. Farr & Bailey
Mfg. Co., 1901, 181 U.S. 218 9,10,15

McAllister vs. United States, 1954, 348 U.S. 19 ... 8,12,14

Oritani, The, 54 F. 2d 1075 11,16

Oxford Paper Co. vs. The Nidarholm
1931, 282 U.S. 681 12,16

Pioneer Import Corp. vs. SS Lafcomo,
49, F. Supp. 559 13

Southhawk, The, 1903, 191 U.S. 1 12

Statutes:

28 U.S.C., Federal Rules of Civil Procedure,
Rule 52(a) 6,8

46 U.S.C. 190, et seq. 11

46 U.S.C. 1300 et seq. 16

46 U.S.C. 1301, et seq. 10

46 U.S.C. 1304 (1) 10

46 U.S.C. 1304 (2) (q) 10

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 1002

HEINRICH C. HORN,

Petitioner,

versus

CIA DE NAVEGACION FRUCO, S.A., and
J. R. ATKINS, d/b/a ALABAMA FRUIT
AND PRODUCE COMPANY,

Respondents,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

The Respondents, Cia de Navegacion Fruco, S.A., and J. R. Atkins, d/b/a Alabama Fruit and Produce Company, respectfully submit their brief in opposition to Petitioner's Writ of Certiorari seeking review by this Court of a judgment of the United States Court of Appeals for the Fifth Circuit, affirming in part and reversing in part a decree in Admiralty rendered by the United States District Court for the Southern District of Alabama.

EARLIER REPORTS

The opinion of the District Court is reported at 233 F.

Supp. 637 (Appendix C of Petition). The opinion of the Court of Appeals entered on November 5, 1968 is reported at 404 F. 2d 422 (Appendix A of Petition).

Respondents are satisfied with the presentation of JURISDICTION, QUESTIONS AT ISSUE, and STATUTES INVOLVED as set forth in the Petition of Heinrich C. Horn, Petitioner.

STATEMENT OF THE CASE

Respondents are not in agreement with the statement of the case as set forth in the Petition of Petitioner for Writ of Certiorari and respectfully make the following statement of the case:

There is involved in this action four (4) cases which were consolidated for trial in the District Court and consolidated on appeal in the Court of Appeals. All of the cases arose out of the charter of two sister vessels, the HEINZ HORN and MARIE HORN, by Petitioner to the Respondent Cia de Navegacion Fruco, S.A. The first case, referred to by the courts below as Voyage Number 1, involved a shipment of bananas in boxes and stems on the HEINZ HORN; the second case, referred to by the courts below as Voyage Number 4, involved a shipment of bananas on the HEINZ HORN in stems; the third case involved a claim by Petitioner for charter hire of the HEINZ HORN; and the fourth case involved a claim by Petitioner for charter hire as to the MARIE HORN. Petitioner seeks a review only of the decision of the Court of Appeals as to the three cases involving the HEINZ HORN.

On April 30, 1962, Cia de Navegacion Fruco, S. A. (herein referred to as "Fruco") entered into a time charter

agreement with Heinrich C. Horn (herein referred to as "Horn") for the charter of the M/V HEINZ HORN for the carriage of bananas between good and safe ports in Ecuador and the Gulf Coast. The charter agreement, while on a New York Produce Exchange Charter Party printed form, was replete with deletions, interlieations, and appended over 40 additional mimeographed clauses so as to make the charter agreement applicable only to the partics here involved. The charter specifically and emphatically warranted the vessel as a banana carrier and also expressly, by typewritten interlineation, warranted that the master would "use diligence in caring for the proper ventilation and refrigeration of the cargo", and "also run temperatures in accordance with charterer's instructions."

Although warranted as a "banana carrier" the HEINZ HORN was admittedly neither designed nor utilized exclusively as a banana carrier, and it carried frozen produce on many occasions where production of subfreezing air is required.

Pursuant to the said charter party the HEINZ HORN went on charter to Fruco at Mayaguez, Puerto Rico on or about June 3, 1962. The vessel proceeded to Puerto Bolivar, Ecuador to commence its initial voyage under the charter. In accordance with the charter, the charterer delivered written instructions to the ship before it arrived in Bolivar advising as to the care in stowing of the cargo and maintenance of temperatures. The vessel arrived in Bolivar on June 10th and commenced loading bananas under the supervision of the ship's officers (R. 244). The bananas were loaded on board the vessel in both stems and boxes. On June 12, 1962, the master signed two clean receipts or bills of lading for the cargo, without exception, acknowledging it to be in good order and condition. Respondent Alabama

Fruit & Produce Company was consignee of the cargo and upon presentation of the clean bills of lading, a letter of credit furnished by Alabama Fruit & Produce Company was honored by an Ecuadorian bank and the sale consummated to Alabama Fruit & Produce on June 12, 1962. The stowage of the cargo in the hatches was supervised by Wilhelm Schultz, the Chief Officer, or by the mate on watch. The Master of the vessel, being ill, was never seen on deck during the loading operation in Puerto Bolivar by witness Jose Turner (R. 240), although the Chief Mate testified to the contrary.

The Chief Mate and the mate on watch supervised the loading of the cargo as evidenced by the following entry in the vessel's deck log for June 12, 1962 (L. Ex. 36):

> *"The cargo was loaded under supervision of the Captain and officers.* The ship was at the beginning of the voyage in a thoroughly seaworthy condition, and was properly fitted out and provisioned. *The crew was complete and healthy."* (Emphasis supplied)

During the three day period while the cargo was being loaded and stowed, the ship's officers failed and/or refused to operate the vessel's refrigeration equipment. The refrigeration equipment was finally placed in operation at 6:00 p.m. on June 12th, and the vessel sailed for Mobile, Alabama at midnight on the same day.

On June 15th, according to the Chief Mate, the vessel passed through the Panama Canal, and the Master, who had been ill for sometime, left the vessel. It should be noted that the Master's illness was neither sudden nor unexpected. He had been, according to the Chief Mate, seriously ill for several months before the vessel went on charter and prior

to the time the vessel ever reached Puerto Bolivar.

The only evidence presented at the trial as to the normal complement of officers required on the vessel was the testimony by deposition of the Chief Mate who testified the normal complement of officers was a Master and three (3) mates, but that there were only two (2) mates aboard who shared the third officer's pay (L. Ex. 40, pp. 5, 6).

The Petitioner appends as an Appendix G to his Petition a printed copy of a letter from the office of the German Consulate General to Messrs. Lamote, Burns & Co., Inc. (Neither of whom were parties to this litigation in the courts below) to the effect that a German Code, which has never been offered in evidence in this cause, requires only a Master and two mates on the class of vessel of the HEINZ HORN. The said letter is dated July 22, 1968 (several years after the trial of the subject case in the District Court) and was not offered in the District Court; the letter was first presented in the Court of Appeals as an appendix to the Petitioner's Petition for Rehearing filed in the said Court of Appeals following that Court's initial opinion dated June 28, 1968. While it is submitted the letter is completely inadmissible at this late date as being hearsay, self-serving, irrelevant, incompetent and immaterial, the fact remains that

irrespective of the new contended complement of mates under the alleged German Code, the normal complement of mates on the HEINZ HORN was three (3) mates according to the testimony of the vessel's Chief Mate and as found by the District Court.

Neither the Master nor the two young mates were experienced with the carriage of bananas in boxes; nor had the HEINZ HORN ever carried boxed bananas. The

experience of the Chief Mate was primarily with general cargo.

The vessel arrived in Mobile, Alabama on June 21st at 8:00 p.m. and her hatches were opened for the commencement of discharging operations at 7:00 a.m. on June 22nd. At this time, it was discovered that the greatest part of the fruit cargo was in a ripe, ripening and/or turning condition, with much of it "ready to eat." The cargo in the No. 2 hold was almost a total loss; and contrary to the statement and argument of Petitioner, the same pattern of damage existed in the No. 1 hold. The Chief Mate testified that he saw "a high percentage of ripe ones" (bananas) in the No. 1 hold (L. Ex. 40, pp. 53, 54), and that in his opinion the vessel had a poor output in the No. 1 hold (L. Ex. 40, p. 60). Witness Haas testified the fruit in the No. 1 hold had a high percentage of ripes and that *some* of the fruit in the No. 1 hold was sold, but not all of it (R. 213). The trial court found damage to the *entire* cargo, not just damage in the No. 2 hold as Petitioner endeavors to state. The record clearly shows that all the cargo in the No. 1 hold was not accepted and sold as stated by Petitioner in his Petition for Writ of Certiorari.

The District Court found, on substantial evidence, that the vessel failed to exercise due diligence to insure the safe carriage of the cargo in that her officers failed to cause the bananas to be stowed properly, and further found the vessel failed to exercise due diligence in promptly pulling down the air temperature in the cooling system and maintaining the temperature at the desired level.

The Court of Appeals affirmed the determinations of the trial court and found they were not clearly erroneous, citing Rule 52(a), Federal Rules of Civil Procedure,

McAllister v. United States, 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. Ed. 20, and other authorities. In addition, the Court of Appeals concluded the vessel was unseaworthy with regard to its personnel, and further held under the particular charter party and the specific facts involved, the vessel was responsible for the faulty stowage of the cargo. Damages were awarded Respondents Atkins, consignee of the cargo, and Fruco in the amount of $31,261.64; Horn was awarded damaged for charter hire withheld in the sum of $26,946.76.

Immediately following the first voyage of the HEINZ HORN, Respondents held several discussions relative to the damage and performance of the vessel with Petitioner over a pierod of approximately seven days while the vessel remained off hire in Mobile. Subsequently, the vessel sailed for Puerto Bolivar and stood by for two days waiting for a cargo to be collected. The District Court awarded Horn charter hire for these periods, and the Court of Appeals reversed on the ground the delay resulted from a "deficiency of men" under Clause 15 of the Charter.

On the fourth voyage of the HEINZ HORN, the Master again signed a clean bill of lading, noting no exceptions, for a shipment of 8,170 stems of bananas consigned to Respondent Atkins. The cargo arrived in Mobile with 55.6% of the fruit ripe and turning. This entire cargo consisted of stems of bananas. The Master of the vessel testified by pretrial deposition that he and his officers were on deck during loading of the cargo and that they rejected any stems about which they had any suspicion and that the cargo when loaded looked good to him. The District Court found there was no proof of inherent defect, quality or vice of the cargo; the Court awarded damages of $18,495.73, plus interest to Respondents. The Court of Appeals affirmed

and in addition held that the provisions of the Carriage of Goods by Sea Act barred Horn from raising the refrigeration clause of the charter party as a defense.

The Court of Appeals further affirmed the District Court's finding that Horn had mitigated any damages it may have sustained by reason of the M/V HEINZ HORN and her sister ship the M/V MARIE HORN being redelivered prior to the expiration of the charter periods for the vessels.

REASONS FOR REFUSING THE WRIT

The issues in the present case are of such limited breadth that they fall far short of meriting review by this Court on certiorari. As may be readily observed from a review of the opinion of the Court of Appeals below, this case turned primarily in the District Court on a determination of contested facts, and the Petitioner is in effect requesting this Court to again review those facts which have been previously resolved against him. The Court of Appeals, on the basis of Rule 52(a) Federal Rules of Civil Procedure and *McAllister vs. United States,* 1954, 348 U.S. 19, 75 S. Ct. 6, 99 L. ed. 20, accepted the determinations of the District Court and found they were not clearly erroneous.

The conclusions reached in the Court of Appeals were based on the particular charter agreement involved and the facts as presented by the evidence. The charter agreement, while on a New York Produce Charter Party printed form, was extensively amended by deletions, additions and interlineations to set forth the agreement of the parties involved in this litigation and the exact purpose for which the vessel was to be used (R. Ex. No. 2). The charter party, as thus amended, was not a standard printed form, but was

in terms applicable to the parties to this particular litigation and to the particular and specialized cargo involved. Consequently, this particular litigation is not of interest to the shipping industry as a whole, but it is of interest only to the litigants here involved in light of the facts as presented.

The decision of the Court of Appeals is clearly correct, and there is no conflict of decisions presented in this case nor does it present any important question of Federal law requiring consideration and decision by this Court.

I

The decision below is clearly correct.

The Court of Appeals affirmed the judgment of the District Court awarding damages to Respondents as to Voyage Number 1 of the HEINZ HORN on two separate grounds. These theories are: (1) under the facts the vessel was unseaworthy due to the lack of an adequate and competent crew, relying on this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, 1901, 181 U.S. 218, 21 S. Ct. 591, 45 L. ed. 830, and its own decision of *The Framlington Court*, (5 Cir., 1934) 69 F. 2d 300, cert. denied 292 U.S. 651, 54 S. Ct. 860, 78 L. Ed. 1500; and (2) the damage to the cargo resulted from improper stowage, said stowage, having been supervised by the master and officers, was the responsibility of the vessel. Both of these findings were substantially supported by law and fact.

a.

Inadequate Crew

Petitioner complains there is no support for the Court of Appeals conclusion that a vessel is deemed to be

unseaworthy at the commencement of the voyage unless the owner insures that adequate and competent personnel will remain on board throughout the voyage. Such conclusion is amply supported by this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, supra, and by the case of *The Framlington Court*, supra, both of which were relied upon by the Court of Appeals. Here, the Court found the vessel's officers were both numerically inadequate and lacking in proper training for the carriage of the delicate cargo of bananas, and this situation not only continued throughout the first voyage, but it was in existence when the vessel initially went on charter.

Both the trial court and the Court of Appeals correctly found the vessel failed to exercise due diligence in the carriage of the cargo. The Court of Appeals held, and correctly so, that it was immaterial whether the cause of the loss was manifested by the numerical inadequacy of the crew, or the want of proper training and instruction, since Petitioner failed to carry its burden of proving an absence of causation between the unseaworthiness and the loss. The charter party and the particular shipment of bananas were subject to the Carriage of Goods by Sea Act, 46 U.S.C. 1301 et seq. Section 1304 (1) of that Act provides in part:

> "Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section."

The Act further provides in 1304 (2)(q) that:

> "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from --

* * * *

> "(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

COGSA clearly placed the burden of proving lack of causation on the Petitioner, and the court below concluded Petitioner failed to carry this burden.

Petitioner contends that the Third Circuit Court of Appeals decision of *The Oritani,* (3 Cir., 1931) 54 F. 2d 1075, affirming 40 F. 2d 522, is in conflict with this case on the burden of proof issue. However, a reading of the case will show that the case is clearly not in conflict with the case at bar. Furthermore, it was decided in 1931 under the Harter Act, 46 U.S.C. 190, et seq. and not under COGSA which was enacted in 1936. Consequently, there could be no conflict between this case and *The Oritani,* supra, because COGSA has in effect supplemented the Harter Act. However, irrespective of any contended conflict on the issue of who bears the burden of proof as to causation, the evidence in the trial court was overwhelming that the vessel had an incompetent and inexperienced crew which failed to exercise due diligence in the carriage and stowage of the cargo; in addition, the District Court found, and the Court of Appeals affirmed, that the necessary temperatures for the carriage of the delicate cargo of bananas was not reached within the period of time required for the safe and proper carriage of bananas. It obviously

follows that such failures were the direct cause of the damage to the cargo.

The evidence was conclusive that the crew was inadequate and failed to exercise due diligence. This finding of the Court of Appeals was correct and should not be disturbed. *McAllister vs. United States,* supra.

b.

Improper Stowage

The Court below concluded that the cargo was improperly stowed under the supervision of the master and his mate and that such improper stowage was, under the facts presented, the responsibility of the vessel. The evidence clearly reflected that the ship's officers supervised the stowage. The vessel deck log contains the entry:

> "The cargo was loaded under supervision of the Captain and officers."

The Court of Appeals, relying on this Court's decisions *Oxford Paper Co. vs. The Nidarholm,* 1931, 282 U.S. 681, 51 S. Ct. 75 L. ed. 614, and *The Southwark,* 1903, 191 U.S. 1, 24 S. Ct. 1, 48 L. ed. 65, held that the stowage of the cargo "affected the capacity of the ship to transport the delicate cargo in the manner specified by the charter party" and consequently the "decisions by and for the master with regard to the stowage must be said to have been made on behalf of the ship's owner." Such holding is in accord with the decision of this Court in *Oxford Paper Co. vs. The Nidarholm,* supra, wherein the Court said:

> "This warranty extends to unseaworthiness of the ship due to faulty stowage of cargo...*even though the*

> *charterer himself, subject to the supervision of the Captain, loads it himself. The charterer is entitled to rely on the Master in the exercise of his expert knowledge and judgment,* to control the disposal of the cargo so as to avoid damages to it from any consequent unseaworthiness of the vessel." (Emphasis is supplied.)

As pointed out in the opinion of the Court of Appeals, the facts of this case are distinguishable from those decisions which the Petitioner here contends to be in conflict because here the method of stowage, which was selected and supervised by the Master or the mate on his behalf, directly affected the ability of the vessel to provide the required mode of transportation.

Petitioner recognizes the correctness of the Appellate Court's conclusion that Respondent Atkins, as cargo owner, has an *in rem* action against the vessel, but complains that Fruco, as charterer, may also be liable to Atkins. The undisputed facts is that Atkins has not sued Fruco; he has sued the vessel *in rem* and Horn *in personam.* Irrespective of whether Fruco, as charterer, may be liable to Atkins, as cargo owner,this would not relieve Petitioner or the HEINZ HORN, *in rem,* of their liability for cargo damage. *Pioneer Import Corp. vs. SS LAFCOMO,* et al., (D. Ct. N.Y. 1943) 49 F. Supp. 559, aff'd 138 F. 2d 907, cert. denied, 321 U.S. 766.

Petitioner contends the Court of Appeals incorrectly concluded the burden of establishing inherent vice in the cargo loaded on Voyage Number 4 of the HEINZ HORN rested with the Petitioner. While the Appellate Court upheld the trial court's finding that there was no proof of inherent defect, quality, or vice in the banana cargo on Voyage

Number 4 as not being clearly erroneous, the Court also affirmed the District Court's determination that the vessel's crew failed to exercise due diligence in the operation of the vessel's refrigeration equipment. Such due diligence was required of the vessel under Clause 12 of the charter party.

It appears that Petitioner is arguing that the Appellate Court should have applied a ruling that because the internal condition of the cargo was not adequately revealed by external appearances,the Respondents should have been required to present some evidence beyond a clean bill of lading as to the condition of the cargo at the time of loading. While such a contention overlooks the fact that this cargo consisted entirely of stems of bananas which were readily observable by the Master and his mate, the record clearly shows that further evidence, although not necessary, of the condition of the fruit at the time of loading was in fact offered. The testimony of the Master and Chief Officer was offered by Respondents, as well as a loading report showing the condition of the fruit at the time of loading in addition to the extreme overly ripened condition of the fruit at the time of delivery in Mobile. In considering all of this evidence, the trial court concluded there was no inherent defect, quality, or vice in the bananas and this finding was held by the Appellate Court not to be clearly erroneous. *McAllister vs. United States,* supra. The Second Circuit Court of Appeals has reached the same result in *Elia Salzman Tobacco Co. vs. S. S. Mormacwind,* (2 Cir., 1967) 371 F. 2d 537. (See footnote 2 at p. 539.)

Finally, Petitioner says that the Court of Appeals erroneously reversed the District Court's judgment awarding Petitioner charter hire for the period of time following Voyage Number 1 in Mobile and subsequently in Puerto Bolivar. Such holding was not incorrect inasmuch as Clause

15 of the charter party expressly stated the charterer was not liable for time lost by reason of "deficiency of men." Since these delays or "off-hire" periods directly resulted from the damages cargo on Voyage 1 which was caused by reason of an "inadequate crew", the court below correctly held Respondents were not responsible for the loss of time.

II

There is no conflict of decision.

The Petitioner asserts there were four (4) instances wherein the decision reached in the Court below were in conflict with other Circuit Courts of Appeal. Specifically, these are:

A. The holding that a vessel is deemed unseaworthy at the start of the voyage unless the owner insures that adequate and competent personnel will remain on board throughout the voyage.

The Court of Appeals holding in this regard,while not the sole basis for holding the HEINZ HORN unseaworthy, is in accord with this Court's decision of *International Navigation Co. vs. Farr & Bailey Mfg. Co.*, 1901, 181 U.S. 218, 21 S. Ct. 591, 45 L. ed. 830,and *The Framlington Court*, (5 Cir., 1934) 69 F. 2d 300, cert. denied 282 U.S. 651, 54 S. Ct. 860, 78 L. ed. 1500, and is not in conflict with *Cullen Fuel Co. v. Hedger Co.*, 1933, 290 U.S. 82, S. Ct., 78 L. ed. 189, or with the other decisions cited by Petitioner. To again refer to the facts of this case,the Master did not become ill after the vessel went on charter as he had been ill for sometime prior to the vessel ever going on charter; the vessel did not carry her normal complement of officers; and the officers had no experience with boxed

bananas. These were not conditions beyond the owner's control which arose after the vessel commenced her voyage, but were in existence prior to and at the commencement of the voyage.

B. The holding that the vessel must bear the burden of proving absence of causation between the unseaworthiness and the loss.

Petitioner contends such holding conflicts with the Third Circuit Court of Appeals decision of *The Oritani,* 40 F. 2d 522, aff'd 54 F. 2d 1075 (3 Cir., 1931). As previously noted *The Oritani* is not applicable and it was decided prior to the enactment of the Carriage of Goods By Sea Act 46 U.S.C. 1300 et seq. which expressly places such burden of proof on the vessel. Consequently, the decision herein in following COGSA is not in conflict.

C. The holding of the court below that, under the facts; the shipowner was responsible for the faulty stowage and resulting loss of cargo.

Petitioner contends this holding conflicts with decisions in the Third and Second Circuit Courts of Appeals and is incompatible with this Court's decision of *Oxford Paper Co. vs. The Nidarholm,* 1931, 282 U.S. 681, 51 S. Ct. 266, 75 L. ed. 614. Actually, the decision here on petition is readily factually distinguishable from the cases cited by Petitioner and were expressly distinguished by the Court of Appeals below. The Appellate Court in fact cites *The Nidarholm* decision in support of its conclusion that under the particular facts presented in this case the shipowner was responsible for the faulty stowage and resulting loss. It is submitted that a distinction between facts of cases does not present a conflict such as would warrant a review by this Court on certiorari.

D. The conclusion that the Petitioner shipowner had the burden of proving inherent vice or defect in the cargo.

Petitioner argues that the conclusion by the Court of Appeals to the effect the vessel owner must bear the burden of proving inherent vice or defect in the cargo of stemmed bananas conflicts with decisions of the Second Circuit Court of Appeals and with decisions from various District Courts in the Fifth Circuit. This is simply not the case. The decisions to which Petitioner refers concerned cargo where deterioration may have resulted from a hidden defect which was not adequately revealed by external appearances; here, the cargo was stems of bananas which were easily observable. The decision of the Court below was grounded on considerable more evidence as to the condition of the cargo at the time of loading than a clean bill of lading. In addition, the Court made a positive finding of lack of due diligence on the part of the vessel's officers and crew in caring for the cargo. It is submitted the decisions referred to by Petitioner are not applicable to the facts here presented, and there is no conflict between those cases and the instant case.

III

There is no important question of Federal law.

The issues in this case involve only a factual situation pertaining to shipments of bananas under a charter party agreement which was applicable only to the particular parties thereto. The questions presented, while arising under admiralty and maritime law, are not of the significant importance which merit review by this Court.

CONCLUSION

The decision in the Court of Appeals primarily involved a determination of facts and does not present questions of general importance to the entire shipping and insurance communities. The charter party involved, although on a standard printed form, was extensively amended to conform to the purpose and intent of the parties, and the

conclusions of the Court of Appeals pertained to this particular charter party, as thus amended. This case does not give rise to a conflict of decisions, but rests solely on its own unique factual situation.

It is respectfully submitted that the questions here raised by Petitioner are not of such general importance or concern so as to warrant a review by this Court and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

T. K. JACKSON, JR.
Counsel for Respondents

Rae M. Crowe
W. Boyd Reeves
Armbrecht, Jackson & DeMouy
1101 Merchants National Bank Building
Mobile, Alabama 36601
Of Counsel

PROOF OF SERVICE

I, T. K. JACKSON, JR., the attorney for the Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14 day of March,1969, I served a copy of the foregoing brief for Respondents in opposition on Heinrich C. Horn, Petitioner herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, to the Honorable John H. Tappan, attorney for the Petitioner, at his office address, 510 Van Antwerp Building, Mobile, Alabama 36601.

T.K. JACKSON, JR.
Counsel for Respondents
1101 Merchants National Bank Building
Mobile, Alabama 36601